INDEX

TABLE OF CASES:

	Page
Grand Trunk Western Railway Co. v. *United States*, 252 U. S. 112	4, 5
McGrath v. *Kristensen*, 340 U. S. 162	2
Midstate Co. v. *Penna. R. Co.*, 320 U. S. 356	7
Morrisdale Coal Co. v. *Pennsylvania R. R. Co.*, 230 U. S. 304	3, 7
Union Pacific Railroad v. *United States*, 125 C. Cls. 390	8, 9, 10, 11
United States v. *Kansas City Southern Railway Co.*, 217 F. 2d 763	7
War Materials Reparation Cases, 294 I. C. C. 5	12
Miscellaneous:	
Webster's New Collegiate Dictionary, 1956, pp. 558–559	12
Statutes:	
Act of February 28, 1920, 41 Stat. 49	7
Act of June 7, 1924, 43 Stat. 633	7
Act of September 18, 1940, sec. 322, 54 Stat. 913 (49 U. S. C. 66)	4, 7
Interstate Commerce Act (24 Stat. 379, 49 U. S. C. 1, *et seq.*, sec. 16 (3)	5, 6, 7

404255—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 18

UNITED STATES, PETITIONER

v.

THE WESTERN PACIFIC RAILROAD COMPANY, BANGOR AND AROOSTOOK RAILROAD COMPANY, AND SEABOARD AIR LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents' brief argues that the Government seeks to inject "into the case, in violation of the Rules and practice of this Court, * * * questions not put forward in its petition for certiorari" (Resp. Br., pp. 18, 34–37). We carefully explained in our opening brief (pp. 12–14), as we did earlier in our petition (p. 8), that the Court of Claims, in taking jurisdiction of these carrier suits, necessarily assumed that the statute of limitations incorporated in Section 16 (3) does not apply to carrier suits against the United States, though it has held, at the same time, that the same limitations circumscribe the defenses

which are available to the Government. See, also, the Government's Question 1, as it appears both in the petition (p. 2) and the opening brief (p. 2). The burden of our argument has been (and is) that, on the Court of Claims' assumption that the carrier is not barred from suit, its decision is nonetheless plainly wrong. Respondents take us to task for stating that this Court may also see fit to examine the validity of the underlying assumption. In our view, this vehement complaint challenges an old and familiar doctrine, confirmed as recently as the decision in *McGrath* v. *Kristensen,* 340 U. S. 162, 167–168: That a party, at any stage, may properly call attention to a jurisdictional question, and that this Court may always examine such a question if it sees fit.[1]

2. Respondents advance three theories in justifying the refusal of the court below to refer the "reasonableness" question to the Interstate Commerce Commission: (*a*) The Government "had ample opportunity" to raise the question by instituting proceedings before the Interstate Commerce Commission within the two-year period prescribed by Section 16

[1] The petition also raised the question whether the Court of Claims correctly decided the classification issue in the case (question 2). We argued that it had not because uncontroverted affidavits required a conclusion contrary to that reached. We have also argued that the Court may find it unnecessary to decide that issue because it may conclude that, at the least, the court below should have fully tried the issue, instead of deciding it against the Government on summary judgment. The latter argument is certainly fairly comprised by the question. Far from broadening the question and increasing the burden on this Court (see Resp. Br., pp. 47–48), it narrows and limits.

(3) but failed to do so (Resp. Br., pp. 13, 22); (*b*) the two-year limitation period limits the Commission's power so that the Commission would have no jurisdiction thereafter to entertain the "reasonableness" question on a referral; (*c*) *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304—a case not relied on by the Court of Claims and cited in respondents' brief here for the first time—"is controlling" and "requires affirmance" of the judgment below (Resp. Br., p. 32).

We deal *seriatim* with these arguments.

(*a*) The Government's so-called "ample opportunity" to raise the "reasonableness question" before the Commission within two years is completely illusory. The shipments in the *Western Pacific* case, for example, took place in 1948 and 1950. The carrier at that time received payments from the Government computed on the basis of the lower fifth-class rate (U. S. Br., p. 7, n. 3; Resp. Br., p. 3). It was not until the carrier filed suit in the Court of Claims in 1954, exactly six years after the first shipment and four years after the last shipment, that the carrier claimed underpayment, challenged the application of the fifth-class rate, and asserted it was entitled to the higher, first-class rate (R. 1, 3). It follows that there was no need and, indeed, no warrant for the Government to proceed before the Commission within two years after the 1948 and 1950 shipments.

Similar considerations apply to the *Bangor and Aroostock* and *Seaboard* shipments in 1944. These two shipments were originally paid for at the higher, first-class rate (U. S. Br., p. 7, n. 3). On post-audit

by the General Accounting Office, the charges were recomputed at the lower, fifth-class rate, and, as explicitly authorized by Section 322 of the Transportation Act of 1940, 49 U. S. C. 66, the overpayments were deducted from the amounts due the carriers on later transportation services. Section 322, while directing payment of carriers' transportation bills on presentation and before audit, protects the Government by expressly reserving to the Government this right to deduct overpayments from later bills. See U. S. Br., pp. 4, 40. The existence of this right requires outright rejection of respondents' claim that the Government can protect itself against overcharges only by instituting Commssion proceedings within two years after shipment (U. S. Br., pp. 19–20). Section 322, of course, imposes no such restrictive limitation on the Government. And even apart from Section 322, it is a settled principle that the Government, in recouping overpayments through deductions, is not required first to establish the "illegality" of the overpayment or the legality of the deduction. *Grand Trunk Western Railway Co.* v. *United States,* 252 U. S. 112, 120.[2] Respondents' theory, if accepted,

[2] The *Grand Trunk Western Railway* case also originated as an action by the carrier in the Court of Claims to recover deductions made by the Government in 1912 for overpayments to the carrier during the prior twelve-year period. 252 U. S. 112, 117. In writing for a unanimous Court, Justice Brandeis rejected the contention that the validity of the deduction should have been established before it was made and stated flatly that the Government "was under no obligation to establish the illegality [of the prior overpayments] by suit" and that, "It matters not how long a time elapsed before the error in making the overpayment was discovered or how long the attempt to

would nullify this principle and, at the same time, strip the Government of the full, post-audit protection Congress intended to accord it in Section 322.

(*b*) Respondents argue that Section 16 (3)'s two-year limitation period limits the power of the Commission and that it would therefore have been a vain act to refer the question of "reasonableness" to that agency. But we are not concerned here with the original jurisdiction of the Commission. The courts are obliged to refer to the Commission questions arising in a judicial proceeding which are appropriate for the agency's determination. U. S. Br., p. 16, *et seq.* Section 16 (3) creates no obstacle to this procedure, for its language applies only to actions instituted before the Commission. It does not impinge upon the power of referral as an incident of a judicial proceeding. In all of the cases cited by respondents Section 16 (3)'s limitation period was invoked to bar an *affirmative* claim advanced by the *plaintiffs* in those cases. Those cases are not apposite. Here, the plaintiff seeks to invoke the statute of limitations as a means of preventing the defendant from establishing a defense before the Interstate Commerce Commission, concededly the only body authorized to pass upon the correctness of the defense. This distinction is of crucial significance because, if the court below was right, the two-year limitation period constitutes no bar to the carriers' suits against the

recover it was deferred. The statute of limitations does not ordinarily run against the United States and would not present a bar to a suit for the amount." 252 U. S. 112, 121.

United States but nevertheless bars the United States from obtaining consideration before the Interstate Commerce Commission of its major defense to such suits. In short, the carrier would be allowed to collect charges which are unreasonable simply by waiting for two years to elapse before filing suit against the United States in the Court of Claims.

Furthermore, respondents' argument that referral was improper because the Commission lacked power upon expiration of the two-year period is predicated on the assumption that a limitations defense of this sort may be applied to the United States. But, as we have shown in our main brief, the United States is not subject to the limitation provisions of Section 16 (3) (U. S. Br., pp. 25–27).

Respondents do concede that this two-year limitation period cannot be invoked against the United States "if it goes to court" (Resp. Br., p. 19). Respondents further recognize that this concession necessarily "follows from the general proposition that the United States, as sovereign, is not bound by statutes of limitations, * * * except of course where it is specifically named in the statute" (Resp. Br., pp. 19–20).[3] It also follows from the same general propo-

[3] Respondents' brief advances this same "sovereign's traditional immunity from" limitations as the sole explanation for the Court of Claims' holdings immunizing the carriers from Section 16 (3)'s statute of limitations. At pages 33–34 of their brief, respondents set forth the general reasoning that the United States, because of the *sovereign's* traditional immunity, is not subject to limitations. The brief then boldly asserts, at page 34, that "by parity of reasoning" the Court of Claims has refused to apply to the *carriers* Section 16 (3)'s two-year limitation period!

sition, we submit, that Section 16 (3) cannot be invoked against the Government with respect to Commission proceedings. Section 16 (3) is inapplicable to the Government whether it is before the Commission or a court. In both instances congressional failure to refer explicitly to the United States in Section 16 (3) precludes application of that Section's period of limitations.

(*c*) The *Morrisdale Coal Co.* case, not previously cited by respondents, is now advanced as "controlling". At the outset, we would point out that respondents' brief incorrectly states that the "Eighth Circuit's decisions relied on by the Government ignore" the *Morrisdale* case (Resp. Br., p. 33). Our main brief relies on and quotes from the Eighth Circuit's opinion denying a petition for rehearing in *United States* v. *Kansas City Southern Railway Co.*, 217 F. 2d 763, 769–770 (U. S. Br., pp. 21–22). In the same opinion, at page 775, the Court of Appeals fully explains and discusses the *Morrisdale* case and shows that it is in nowise inconsistent.

Morrisdale, decided in 1913, dealt with a statute of limitations provision in Section 16, which has since undergone considerable revision. See Act of February 28, 1920, 41 Stat. 491; Act of June 7, 1924, 43 Stat. 633; Act of September 18, 1940, 54 Stat. 913. Section 16, as it stands today, bears little resemblance to the Section 16 involved in *Morrisdale*. *Midstate Co.* v. *Penna. R. Co.,* 320 U. S. 356, 362, Note 15.

Equally important is the fact that in *Morrisdale* the statute of limitations was invoked against the plaintiff in order to bar an affirmative claim. Here, as already noted, respondents seek to invoke the limita-

tion as a bar to the consideration of a defense. See page 5. Furthermore, here, unlike *Morrisdale*, there was, as we have shown, no need or warrant for the Government to file an anticipatory claim with the Commission. See pages 3–5. Finally, *Morrisdale* in no way dealt with the special immunity of the Government as a shipper or carrier from federal statutes of limitation defenses. For all of these reasons, we believe it plain that *Morrisdale* is not only not controlling but not even in point.

3. In justifying the Court of Claims' holding that the shipments involved were "incendiary bombs", respondents (*a*) rely primarily on the findings and decision of the Court of Claims in an earlier case, *Union Pacific Railroad* v. *United States,* 125 C. Cls. 390, and (*b*) argue that the shipments were subject to the Interstate Commerce Commission's Regulations on "Explosives and Other Dangerous Articles" and for that reason subject to the high, first-class rates of Item 1820 (Resp. Br., pp. 4–10, 51–58, 72).

(*a*) Obviously, the Court of Claims' opinion in *Union Pacific Railroad* v. *United States,* 125 C. Cls. 390, does not justify deprivation of the Government's right to its day in court and to a trial on the merits of the instant cases, in which an entirely different record was developed (R. 86).

In the *Union Pacific* case, the record was complicated by the fact that 500-pound PT1-gel-filled bomb cases were involved in addition to the napalm-gel-filled hundred-pounders (Resp. Br., p. 4). In the instant cases, there is no doubt that only napalm-gel-filled bodies are involved.

Of much greater importance, however, is the fact that the Government in the *Union Pacific* case incorrectly stipulated that the bomb cases were filled with an "incendiary mixture." The carrier's counsel in that case built his entire case on this stipulated "fact". His opening statement emphasized that it had been "stipulated" that "the articles in question are steel bomb bodies filled with incendiary mixtures" (Transcript of Testimony, *Union Pacific Railroad Company* v. *United States* (125 C. Cls. 390), No. 49505, at p. 1). His questions to witnesses constantly referred to bombs filled with "incendiary mixtures" (*Id.* at pp. 15, 16, 17, 19). His questions always assumed that the only "dispute in this case" is the "rating" of bombs filled with "incendiary mixtures" (*Id.* at p. 25). The questions would accordingly begin with the assertion: "The question about to be put to you is based on the stipulated facts which you may assume to be established as follows: The articles offered for shipment are steel bomb bodies filled with an incendiary mixture" (*Id.* at pp. 26–27, 45). The answers elicited from plaintiff's witnesses thus presupposed that the mixture was an incendiary one (*Id.*, pp. 33, 45). Again, at another point in the trial of the *Union Pacific* case, carrier's counsel stressed the concession in "the stipulation of facts that these were bomb bodies filled with incendiary mixture, so there is no use talking about something that is not incendiary" (*Id.* at p. 41).

Thus, the incorrect stipulation, around which the carrier's case and evidence were built, permeated the entire trial of the *Union Pacific* case. It is true that

the Government, at the close of that trial, realized that the stipulation was incorrect, and that the mixture was not in fact incendiary. At that point, steps were taken to correct the stipulation. But the harm caused by the error had already been done. The carrier's evidence, based on the incorrect stipulation, was already in the record and was not stricken. And the Court of Claims' opinion in that case refers in at least two places to steel bomb bodies "filled with an incendiary gel" or "an incendiary mixture," showing the heavy reliance the court itself placed on the stipulation and on the evidence which carrier's counsel was able to adduce on the basis of the stipulation. 125 C. Cls. 390, 392, 393; see Resp. Br., p. 9.

There is, of course, no such stipulation or concession in the cases now here. To the contrary, as the uncontroverted affidavits in the record show, all of the evidence in the cases now here is to the effect that napalm gel is *not* incendiary (U. S. Br., pp. 28–30; R. 8, 10, 12, 13, 75–77, 79).

There is still a third important distinction between the *Union Pacific* case and the ones now here. The former case placed considerable weight on the reference to "incendiary" in War Department Billing Guides, Field Manuals, and Technical Manuals. Resp. Br., pp. 8, 9, 67. In the instant cases, the record establishes that the Army's description was not accurate and that all the description intended to convey was that the steel bomb body and the napalm gel filler—neither of which is incendiary—were component parts to be used in assembling a complete incendiary bomb. Thus, the affidavits in the record

of Mr. Fay and of Drs. Finkelstein and Magram all point out that the description in the Army manuals "denotes the eventual use to which the completed bomb will be put and is not descriptive of a steel bomb body filled with Napalm Gels alone" (R. 8–9, 10, 13). And, as the record shows, the term "incendiary", as used by the Army, merely identifies "tactical use of the completed bomb" (R. 11). Moreover, the record here further shows that, prior to the shipments involved in the cases now here, the Army Freight Billing Guide (Resp. Br. 8–9) was revised in view of the fact that a napalm-filled bomb body "shipped, without burster and fuze, was neither incendiary nor explosive" (R. 14).

The present cases, therefore, are entirely different from *Union Pacific,* and respondents' attempt to rely on the decision rendered on the record as developed in the latter case is plainly unwarranted.

(*b*) Our main brief points out that a shipment does not come under the high, first-class rates of Item 1820 unless it is subject to the Commission's Regulations on "Explosives and Other Dangerous Articles" (U. S. Br., pp. 32–35). Respondents suggest that this requirement is met because steel bomb bodies filled with napalm gel must be deemed to be "chemical ammunition", and as such are covered by the Regulations. But the record refutes the suggestion. It shows that the shipments may *not* be considered "chemical ammunition". The Bureau of Explosives, which enforces the Regulations, has expressly stated that napalm-gel-filled bomb bodies do not fall within the Regulations because they are not "explosive chemical ammunition" and also do not contain any "of the

chemicals or liquids referred to in Sections 330, 342, and 364 [of the Regulations], relating to chemical ammunition" (R. 21, 19; see Resp. Br., pp. 7–8, 72).[4]

[4] Similarly misplaced is respondents' reliance on the *War Materials Reparation Cases*, 294 I. C. C. 5 (Resp. Br., pp. 45–46). Those cases involved the question of reasonableness of application of the high first-class rates to several articles which, unlike the shipments in the present case, were in fact "explosive" or otherwise "dangerous" ammunition and hence covered by the Commission's Regulations.

One final point deserves mention; respondents attack the Government for "misleading references" to "napalm gel" as "napalm" and for failure to distinguish precisely between these "two distinct substances." Resp. Br., pp. 74–75. We are convinced that our main brief adequately distinguishes the two and shows that napalm gel is simply gasoline which has been thickened or gelatinized by the addition of a soap powder known as "napalm" (Br., pp. 5, 28–35). It is interesting to note in this connection that *Webster's New Collegiate Dictionary* for 1956 defines "napalm" not only as "a thickener" but as "also the gelled fuel made with it" (pp. 558–559). Of even greater interest—in light of respondents' attack—is the fact that respondents themselves in at least *90* places in the record and in their brief in opposition have referred to "Napalm gel" as either merely "Napalm" or "NP". Resp. Br. in Opp., p. 3; R. 2A, 25, 29, 33, 34, 38, 40, 52, 57, 58, 59–61, 70.

In any event, what is of importance is the fact that the thickening of the gasoline by the addition of the napalm retards the gasoline's free-flowing qualities and makes the shipment considerably less hazardous from a transportation viewpoint "than a drum filled with gasoline because Napalm Gel will not and cannot leak from its container because it is a solid substance. Neither will Napalm Gel burn as readily as gasoline" (R. 9, 77). What is equally important is the fact that gasoline concededly is rated at fifth class, that the napalm thickener concededly is rated at fifth class, and that a steel bomb body concededly is rated at fifth class. The Government's basic position in these cases has been that the entire shipment, consisting of the bomb body filled with napalm gel—or with gasoline which has been gelatinized by the addition of napalm—should also be rated fifth class and not, as the court below held, first class under Item 1820.

CONCLUSION

For the reasons stated in this brief and in our main brief, we respectfully submit that the judgment below should be reversed and the cause remanded with directions which will permit a full presentation of the petitioner's defenses.

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